APPENDICES

APPENDIX A

[Petitioner and his counsel are indebted to Anthony Alperin, Robert Cooper and Lawrence F. Nelson, Jr., all of whom are members of the first-year class, The Law School, University of California at Los Angeles, each of whom contributed his vacation time without compensation to research of the matters set forth in this Appendix.]

That the problem in the case at bar is widespread in the state court cases is perhaps most easily shown by a selective sampling of cases from several recent state appellate decisions. The opinions do not indicate the existence of exigent circumstances and in each case a search, without warrant, was made of private property. Even though each of these cases must rely on *Rabinowitz* or *Harris* for constitutional authority, and several cite either or both, in none of them is the failure to get a search warrant discussed as a factor in determining whether or not the search was "reasonable."

In *Jackson* v. *State,* 29 Wis. 2d 225, 138 N. W. 2d 260 (1965) the police were informed of narcotics activity at defendant's apartment. Officers went to the apartment and by peeking in a window saw defendant (a parolee) in the company of Edwards, an ex-convict. In the related case, *Edwards* v. *State,* 38 Wis. 2d 332, 156 N. W. 2d 397 (1968) the court suggests that the officers had neither "cause to arrest" nor "cause to search" at that point except for aiding a parole violation [W. S. A. 946.46], a misdemeanor, on the part of Edwards. Edwards was arrested at the door and the apartment searched thoroughly, disclosing hidden narcotics. The Court stated: "Under these circumstances 'probable cause to arrest' also supports a determination of probable cause to believe that evidence and instrumentalities of the crime are within the immediate con-

trol of the person arrested [based on] General police experience . . . "

The effect of this holding is to sanction, on the basis of an observed misdemeanor, the search of an entire residence without antecedent justification and where no further evidence of the misdemeanor could possibly have been found.

A case more verbal in its elimination of a search warrant as a consideration is *Stearsman* v. *State*, 237 Ind. 149, 143 N. E. 2d 81 (1957). In that case the defendants had been under surveillance for at least two days. Four officers went to one defendant's home without warrant of any kind. They entered without consent, arrested the defendant and searched for and seized certain stolen property. Regarding the appellant's motion to suppress the evidence seized in that search, the Court says: *"The sole question thus presented* is whether or not Sergeant Akeman . . . had probable cause to believe that a felony had been committed, and that appellants had committed such felony." (emphasis added)

Thus, Indiana flatly equates the probable cause required for arrest with the probable cause which would support issuance of a search warrant. This case, although decided in 1957, cites *Harris* as authority and purports to apply a Federal standard in evaluating the search.

Illinois apparently also considers only the question of probable cause to arrest and once found validates a search *in or around* the premises of arrest. In *People* v. *Braden*, 34 Ill. 2d 516, 216 N. E. 2d 808 (1966) a man named Conn entered defendant's apartment and left within a few minutes. Upon his departure he delivered narcotics to a third party, whereupon the officers solicited his assistance in gaining admittance to the apartment. Conn, accompanied by officers, returned to the apartment and again was admitted. The offi-

cers followed, forced admittance, arrested defendant, searched the apartment *and a refrigerator and closet outside the apartment.* The Court states: "The controlling question [as to reasonableness of the search] is whether a reasonable and prudent man . . . would have believed that the crime of unlawfully selling narcotics had taken place and that the defendant was guilty of the crime."

The Illinois Court's holding could well be restated to say that probable cause to arrest automatically authorizes search of a home since "no warrant is required."

New Jersey has gone even a step further in *State* v. *Miller,* 47 N. J. 223, 220 A. 2d 409 (1966). In that case Ronald Miller, a parolee, informed police that one Bynum was in his apartment, probably armed, and Miller did not wish to become involved with him. The police, who had an outstanding arrest warrant for Bynum based on a shooting, went to the Miller apartment. Bynum and Miller's brother were there. After arresting Bynum and physically restraining both men, the police made a careful search of the apartment. In a closet concealed narcotics were found. Miller's brother was prosecuted. The search was held to be incidental to the arrest of Bynum, even though he was conceded to be a visitor there.

So it appears that New Jersey has expanded the "area under the control" of an arrestee to include another person's residence which an arrestee is visiting. This concept would seem to have almost unlimited utility for an imaginative policeman. The quotation from Judge Hand, *supra,* pp. 12-13, would then have to read: "[O]ne's papers [and privacy] are safe only so long as one is not at home [and has no visitors]."

Pennsylvania has produced an amazing case. In *Commonwealth* v. *Cockfield,* 411 Pa. 71, 190 A. 2d 898, cert. den. 375 U. S. 920 (1963) police sought an arson

murder suspect. It is very doubtful that "cause to arrest" existed. Defendant's car, parked on the street, was placed under surveillance. After several fruitless hours, the trunk of the car was searched, revealing a recently used gasoline can and some paper which was charred at the edges. The car was then towed to the street in front of police headquarters and disabled. Cockfield somehow regained possession of it. He was arrested the day after the crime. There is no indication that the car was ever seized under court process. But two days after his arrest the car was again searched without warrant and the charred paper and the gas can were seized and ultimately were used in evidence at his trial. The Pennsylvania Supreme Court held that the second search, made two days after the arrest and without any lawful impound of the car, was incidental to the arrest. For some amazing reason, the first search of the car was not challenged.

Therefore, in Pennsylvania a search incident to arrest involves extremely flexible concepts of both time and distance as perhaps the necessities of the case may require.

Connecticut considers the search of a residence without warrant incident to arrest to be well settled. In *State* v. *Davis*, 24 Conn. Sup. 22, 186 A. 2d 383 (1962) the defendant erred in making a sale of liquor to an officer without going through the formality of being licensed to do so. The officers returned shortly afterward, arrested defendant (apparently a little old lady bootlegger) and searched her entire house. The State Supreme Court wrote: "It is well settled . . . that the house of one arrested may be searched as an incident to a lawful arrest therein . . . "

Since neither *Harris* nor *Rabinowitz* made any statement approaching the breadth of that made by the Connecticut court, the question naturally arises as to what constitutional source, if any, supports such a "well settled" rule.

Is it perhaps a well settled rule that contravenes the Fourth Amendment to the United States Constitution?

> Finally New York has a most remarkable case which is probably not highly persuasive authority since it is the decision of a County Court, but it appears nevertheless to stand unchallenged. This is the case of *People* v. *Olszowy*, 47 Misc. 2d 859, 263 N. Y. S. 2d 221 (Erie Co. 1965). A rape victim complained to police and an arrest warrant issued. The officers and the victim went to defendant's apartment and entered to execute the warrant. A cursory search showed that defendant was not present. Therefore, the officers proceeded with the help of the victim to search for and discover evidence in the apartment. On defendant's motion to suppress this evidence the Court held it to be admissible on the ground that it had been seized incident to a *lawfully attempted arrest.*

Does anything remain of the Fourth Amendment when a search which obviously could just as well have been made under search warrant and which did not and could not involve an arrest is nevertheless granted the judicial stamp of approval?

The purpose of this abbreviated summary of state court cases is to illustrate the cancer-like growth which has overtaken the very narrow and very limited facts on which the *Rabinowitz* case rested. Nevertheless, it may be suggested that *Ker* v. *California*, 374 U. S. 23 (1963) has had the effect of validating at least that much of a search without warrant as is involved in a surreptitious or forced entry for the purpose of arrest.

Whether or not *Ker* may have had this effect, it would appear that the substantive holding of the case has been seriously undermined if not disapproved *sub silentio*. Of course it is recalled that the Court was split in several ways on the *Ker* decision. Four votes were for affirmance on the grounds expressed in Part II of the opinion that a) state law permitted unannounced entry to arrest where

there was a possibility of destruction of evidence, and b) the state court's finding of exigent circumstances was supported by the evidence, and c) the federal rule requiring notice of identity and purpose to arrest was not of constitutional origin. The fifth vote for affirmance was cast by Mr. Justice Harlan on the ground that the Fourth Amendment was not directly applicable to state court proceedings.

Ker, if decided today, would almost surely reach the contrary result. a) State law no longer permits unannounced entry to arrest absent substantial evidence to support a finding of danger of destruction of evidence, danger of flight, etc. *People* v. *Rosales*, 68 C. 2d ——,* —— Cal. Rptr. —— (1968). b) The state court's finding of exigent circumstances made in *Ker* would probably not be supportable under the *Rosales* case. c) It has been very recently suggested by this Court that the federal rule requiring announcement of identity and purpose prior to forcing entry to arrest is a rule of constitutional origin. *Sabbath* v. *United States*, —— U. S. ——, 20 L. Ed. 2d 828, 834, fn. 8 (1968). Of course it follows that if the rule is of constitutional origin, it is applicable to the states. Therefore, at least two of the three bases for the substantive holding in *Ker* have been discarded.

If *Ker* is not substantive authority for the cases cited, then they must rest their constitutional validity on *Rabinowitz-Harris*. Such reliance, however, is ill-placed, for a statement that "the house of one arrested may be searched as an incident to a lawful arrest therein" without qualification is simply not supported by either decision. But even more importantly, such a statement has the effect of deleting from the Constitution the words, "and particularly describing the place to be searched, and the persons or things to be seized." No court has such a power.

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* 68 Adv. Cal. 307.

APPENDIX B

RIGHT TO COUNSEL:

"Under these principles, state refusal of a request to engage counsel violates due process [only if it can be shown] that he is so prejudiced thereby as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice.'" *Crooker* v. *California*, 357 U. S. 433, 439 (1958).

"An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver." *Miranda* v. *Arizona*, 384 U. S. 436, 470 (1966).

DUE PROCESS:

"'[As to due process] It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'" [Then holding that comment on failure of accused to testify does not violate due process.] *Twining* v. *New Jersey*, 211 U. S. 78, 102 (1908).

"We . . . hold that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the Court that such silence is evidence of guilt." *Griffin* v. *California*, 380 U. S. 609, 615 (1965).

CONFRONTATION OF WITNESSES:

"Its admission [the deposition of an absent witness] was but a slight extension of the rule of the common law, even as contended for by counsel. The extension

is not of such fundamental character as to deprive the accused of due process of law." *West* v. *Louisiana,* 194 U. S. 258, 263 (1904).

"For me this state judgment must be reversed because a right of confrontation is 'implicit in the concept of ordered liberty [citing cases], reflected in the Due Process Clause of the Fourteenth Amendment independently of the Sixth." *Pointer* v. *Texas,* 380 U. S. 400, 408 (1965) (Mr. Justice Harlan concurring).

ILLEGALLY SEIZED EVIDENCE:

"[Although] the security of one's privacy against arbitrary intrusion by the police" is " 'implicit in the concept of ordered liberty' " it will not be imposed on the States "as an essential ingredient of that right." *Wolf* v. *Colorado,* 338 U. S. 25, 27-29 (1949).

"Today we once again examine *Wolf's* constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on the books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained in violation of the Constitution is, by that same authority, inadmissible in a state court." *Mapp* v. *Ohio,* 367 U. S. 643, 654-55 (1961).